IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2465 OF 2004

ALONG WITH

CIVIL APPLICATION NO.1839 OF 2004

Mrs.Sajeda Nihal Ahmed,
resident of 49, Hajar Kholi,
Malegaon, Tal: Malegaon,
District Nashik. ...Petitioner

Versus

1.Malegaon Municipal Corporation,
Malegaon, District Nashik.

2.Shri D.G.Philip -
The Municipal Commissioner,
Malegaon Municipal Corporation,
Malegaon, District Nashik.

3.The State of Maharashtra,
through the Secretary,
Urban Development Department,
Mantralaya, Bombay - 400 032. ...Respondents

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Mr.M.P.Vashi i/b M/s.M.P.Vashi & Associates
for Petitioner.

Mr.N.V.Walawalkar with Mr.S.M.Sabrad
for Respondents 1 & 2.

Mr.P.I.Khemani, A.G.P. for Respondent No.3.

ALONG WITH

CIVIL APPLICATION NO.1840 OF 2004

Sajida Nihal Ahmed,
residing at K49, Hajarkholi,

Taluka Malegaon, Dist.Nasik. ...Petitioner

Versus

1.Malegaon Municipal Corporation,
Malegaon, District Nasik.

2.State of Maharashtra,
through Secretary,
Urban Development, Mantralaya,
Mumbai - 400 032. ...Respondents

AND

Mohamed Sabir Gauhar,
President, Malegaon City
Youth Congress, residing at
Malegaon, District Nasik. ...Applicant

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Mr.M.P.Vashi i/b M/s.M.P.Vashi & Associates
for Petitioner.

Mr.N.V.Walawalkar with Mr.S.M.Sabrad
for Respondent No.1.

Mr.P.I.Khemani, A.G.P. for Respondent No.2.

Mr.A.R.Shaikh for Intervenor Applicant.

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CORAM: A.M.KHANWILKAR, J.

AUGUST 12, 2004.

ORAL ORDER :

1. Heard Counsel appearing for the parties.

2. Rule. Rule made returnable forthwith, by consent. Mr.Sabrad waives notice for Respondents 1 and 2 in Writ Petition No.2465/04 and Civil Application No.1839/04 and for Respondent No.1 in Civil Application No.1840/04. Mr.Khemani, A.G.P. waives notice for Respondent No.3 in Writ Petition No.2465/04 & Civil Application No.1839/04 and for Respondent No.2 in Civil Application No.1840/04. Mr.Shaikh waives notice for Intervenor Applicant in Civil Application No.1840/04.

3. As short question is involved, the matter is heard for final disposal forthwith, by consent.

4. This Writ Petition takes exception to the decision of the Municipal Commissioner, Malegaon Municipal Corporation, Malegaon dated February 23, 2004. The principal question involved in this Petition is: whether the Commissioner had jurisdiction to declare that the Petitioner has incurred disqualification from being continued as Councillor under Section 10(1)(a) of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as ‘the Act’). The

question is concluded by the recent unreported decision of this Court in **Writ Petition Nos.3218 to 3231 of 2004 decided on July 23, 2004 in the case of Madhukar Deoman Patil, etc. vs. The State of Maharashtra & Ors. etc. etc.** However, according to Respondents 1 and 2, the question is still open for consideration. According to Mr.Walawalkar for the said Respondents, it is only where there is any doubt or dispute regarding the issue of disqualification of the Councillor, it may be obligatory on the part of the Commissioner to make reference to the Judge in terms of Section 12(1) of the Act and not otherwise. In substance, the argument proceeds on the basis that in the fact situation of the present case, neither there can be any doubt nor dispute that the Petitioner had incurred disqualification within the meaning of Section 10(1)(a) of the Act. Inasmuch as, the fact that the Petitioner has been convicted for offences under Sections 353, 504 and 506 of the Indian Penal Code is not in dispute; nor in doubt. Mr.Walawalkar further contends that the nature of offence for which the Petitioner has been convicted by Court of competent jurisdiction, clearly

involves moral turpitude; and for which reason, the Petitioner has automatically ceased to hold the office as Councillor. Therefore, the Commissioner was competent to pronounce the decision which is impugned in this Petition. Mr.Walawalkar further submits that in any case, having regard to the seriousness of the offence, of which the Petitioner has been found to be guilty and has been convicted, this Court in exercise of writ jurisdiction ought not to interfere with the decision of the Municipal Commissioner, which is founded on sound and established principles.

5. Before I proceed to examine the argument canvassed on behalf of the Respondents, it will be necessary to spell out relevant facts that have led to the filing of the present Petition. The Petitioner was elected as a Councillor of the Malegaon Municipal Corporation. She was later on elected as Chairman of the Standing Committee. While in Office, the Petitioner was prosecuted in respect of offence punishable under Sections 353, 504 and 506 of the Indian Penal Code, which was stated to have been committed in the year 1997;

and that criminal case No.242 of 1997 ended in holding the Petitioner guilty of the said offence. Accordingly, the Petitioner has been convicted and sentenced by the competent Criminal Court on 8th January 2004. It is not in dispute that the Petitioner, has thereafter, challenged the said decision of the Criminal Court in Appeal. During the pendency of the said appeal, the Petitioner has been released on bail by suspending the sentence imposed by the criminal Court. It is, however, not in dispute that the order of conviction is not expressly stayed by the Appellate Court. Be that as it may, the Municipal Commissioner issued show cause notice to the Petitioner, calling upon her to show cause as to why action should not be taken against her for having incurred disqualification under Section 10(1)(a) of the Act. The Petitioner submitted explanation in response to the said show cause notice asserting that since the Petitioner has taken up the matter in appeal, the order of conviction passed by the Criminal Court against her was not operating. She further disputed the fact that the conviction so recorded by the Criminal Court would involve moral turpitude. It is the

Petitioner's case that having regard to the stand taken by the Petitioner, there was doubt and in any case, the Petitioner had disputed the factum of Petitioner having incurred disqualification and in that situation, the Municipal Commissioner could not have proceeded with the matter any further, but was obliged to make reference under Section 12(1) of the Act to the Judge. The substratum of the grievance in this Petition is that the Municipal Commissioner had no jurisdiction to declare that the Petitioner has incurred disqualification from being continued as a Councillor, though the disqualification is post election. To buttress the above contention, Petitioner has placed reliance on the decision of the Division Bench of our High Court in **Martin Nirmal Moresh vs. State of Maharashtra & Ors. reported in 2001 (4) Mh.L.J. 643** as well as the unreported decision in the case of **Madhukar Deoman Patil (Supra)**.

6. The stand taken in this Petition is, however, disputed by the Respondents and the Respondents claim that there was no dispute, nor any doubt about the fact that the Petitioner has

incurred disqualification and in such a case, reference to the Judge was unnecessary and uncalled for.

7. Having considered the rival submissions, I would think it appropriate to first deal with the various provisions that would be relevant for examining the controversy in issue. Indubitably, the 74th Amendment of the Constitution of India (74th Amendment Act 1992), has brought about radical change. Article 243Q of the Constitution provides for constitution of the Municipalities. It provides that there shall be constituted in every State,- a Nagar Panchayat, a Municipal Council and a Municipal Corporation. In the present case, we are concerned with the constitution of a Municipal Corporation. Article 243R of the Constitution provides for composition of Municipalities. Article 243V provides for disqualifications for membership. It reads thus :

> **"243V. Disqualifications for membership.-** (1) A person shall be disqualified for being chosen as, and for being a member of a Municipality-
>
> (a) If he is so disqualified by or

under any law for the time being in force for the purposes of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age, of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Municipality has become subject to any of the disqualifications mentioned in clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide."

. On plain language of this provision, it is clear that the person shall be disqualified for being chosen as, and for being a member of a Municipality, if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned. Clause (2) of Article 243V clearly provides that if any question arises as to whether a member of a Municipality has become subject to any of the disqualifications mentioned

in Clause (1) of that Article, the question shall be referred for the decision of such authority and in such manner as the Legislature of a State, by law, may provide.

8. A priori, the law in relation to disqualification incurred by any member will have to be examined in the context of the provisions of Bombay Provincial Municipal Corporations Act, 1949, which is applicable in the present case. Section 9 of the Act provides for qualification of election as Councillor. This provision is relevant for pre-election period. The disqualification incurred by the member Councillor is provided for in Section 10 of the Act. We are concerned with disqualification as provided in Clause (1)(a) of Section 10. Section 10(1)(a) reads thus :

> 10. (1) Subject to the provisions of sections 13, and 404, a person shall be disqualified for being elected and for being a councillor, if such person-
>
> (ai) .....
>
> (aii) .....
>
> (a) has been convicted by a Court in India of any offence involving moral turpitude, unless a period of six years has elapsed since the date of such conviction;

or....."

9. Section 11 of the Act provides that the Councillor shall cease to hold office as such, if at any time during his term of office, he becomes disqualified for being Councillor for the reason of Section 10 referred to above. The question still remains is, which is the Authority competent to decide the question of disqualification. Article 243V (2) clearly provides that if any question arises as to whether a member of a Municipality has become subject to any of the disqualifications, the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide. In the present Act, the Authority to decide the question of disqualification is specified in Section 12 of the Act. Section 12 of the Act reads thus :

> "12. (1) If any doubt or dispute arises whether a councillor has ceased to hold office as such under section 11, such councillor or any other councillor may, and at the request of the Corporation, the Commissioner shall, refer the question to the Judge.
>
> (2) On a reference being made to the judge under sub-section (1) such councillor shall not be deemed to be disqualified

> until the Judge after holding an inquiry in the manner provided by or under this Act determines that he has ceased to hold office."

10. Sub-section (1) of Section 12 clearly provides that if any doubt or dispute arises whether a Councillor has ceased to hold office as such, the Commissioner shall, refer the question to the Judge. In that sense, it is the "Judge" who has been specified as the Authority to decide the question of disqualification. The Act also provides for the procedure to be adopted in such adjudicatory process. Section 405 of the Act makes provision for reference of such kind to be made to the Judge. It provides that the reference as provided in the said provision shall be made to the "Judge". Sub-section (1) refers to the question whether a Councillor has ceased to hold Office under Section 12 as one of the matters, which could be and ought to be referred to the "Judge". Section 434 of the Act provides the procedure to be followed by the concerned authorities in the course of the proceedings. Sub-section (1) of Section 434 pertains to appeals to be heard by the Judge from the orders of the Commissioner and orders of the

District Court. Sub-section (2) provides for matters of all other types for which no specific provision has been made under the Act to be governed by Rules to be specified by the State Government from time to time in consultation with the High Court. In other words, reference under Section 12 of the Act will have to be decided in the manner provided for under the Rules which are specified by the State Government in consultation with the High Court, if any. Section 435 provides for limitation in respect of proceedings to be adopted under the provisions of this Act, which reads thus :

> "435. (1) In computing the period of limitation prescribed for an appeal or application referred to in this Chapter, the provisions of sections 5, 12 and 14 of the Indian Limitation Act, 1908 shall, so far as may be, apply.
>
> (2) When no time is prescribed by this Act for the presentation of an appeal, application or reference, such appeal or application shall be presented or reference shall be made within thirty days from the date of the order in respect of or against which the appeal, application or reference is presented or made."

. Sub-section (2) of Section 435 is applicable to reference such as the present

reference under Section 12 of the Act. In other words, the Act of 1949 provides for a complete mechanism for adjudicating the issue or question as to whether concerned member or Councillor has incurred disqualification. If it is so, the issue of disqualification can be considered only by that Authority and none else, and only in the manner specified by the Act and the Rules made thereafter. In substance, this view is already taken by our High Court in two decisions of Division Bench of this Court. The one of which is pressed into service on behalf of the Petitioner in the case of **Martin Nirmal Moresh (Supra).** There is also another recent case reported in **2004(2) All.M.R. 1 - Smt.Noorjahan M.Aslam Ansari vs. State of Maharashtra & Ors.,** which has taken the view that where any doubt or dispute has arisen as to whether the Councillor has ceased to hold the Office as such under Section 11, then Councillor or any other Councillor may, and at the request of the Corporation, the Commissioner shall refer the question to the Judge. It is further observed that Section 12 of the Act does not give the Municipal Commissioner the power to decide the controversy

himself. As mentioned earlier, in the recent unreported decision in the case of **Madhukar Deoman Patil, etc. (Supra)**, I had occasion to consider this question and I have taken the view following the principle stated in the decision in the case of **Martin Nirmal Moresh (Supra)**, that the Municipal Commissioner has no authority or jurisdiction to consider or adjudicate upon question as to whether any Councillor of the Corporation has become subject to any of the disqualifications provided by the Act.

11. To get over this position, it was contended on behalf of the Respondents that such reference would be necessary only when there is any doubt or dispute. This argument does not commend to me. If this argument was to be accepted, it will not only whittle down the mandate provided for in Section 12 of the Act, but also impinge upon the Constitutional scheme as spelt out from Article 243 V(2) of the Constitution. The expression "doubt" or "dispute" will have to be understood to mean that whenever concerned Councillor contests the position that he has incurred any disqualification,

then in such a case, it is not open for the Municipal Commissioner to himself examine whether the stand taken by the Councillor is appropriate or otherwise. But, the only course open to the Municipal Commissioner will be to make reference to the "Judge" as defined under Section 2(29) of the Act. Any other view will result in rewriting the Law made by the Legislature. It will be useful to mention that in other cognate enactments of the State of Maharashtra, to wit- The Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (Sections 44 and 45) as well as Bombay Village Panchayat Act [Section 16(2)], such issue can be examined by the Collector. There is express provision to that effect. Unlike in the present enactment, the Commissioner has no option but to make reference to the Judge, in view of the express provision in Section 12 of the Act.

12. A priori, this Court has no option, but to hold that the Municipal Commissioner has acted without jurisdiction in passing the impugned order holding that the Petitioner has incurred disqualification from being continued as a

Councillor under Section 10(1)(a) of the Act.

13. Mr.Walawalkar for Respondents and Mr.Shaikh for Intervenor Applicant vehemently submitted that having regard to the fact that the order of conviction is still operating against the Petitioner and request made on behalf of the Petitioner to stay the operation of the order of conviction having been refused right up to this Court, it necessarily follows that the Petitioner has incurred disqualification within the meaning of Section 10(1)(a) of the Act and that is an indisputable fact. Indeed, the factum of order of conviction having been passed and the same is still operating against the Petitioner, even if is indisputable, even so, it cannot be assumed that she has incurred disqualification - for it is imperative to find out whether that offence involves moral turpitude. That question will still have to be considered and answered before taking the view that the Petitioner has in fact incurred disqualification and, such an enquiry will have to be made only by the concerned Judge, to which reference will have to be made under Section 12(1)

of the Act. Indeed, Counsel appearing for the Respondents contend that the offence committed by the Petitioner was of a serious nature, and would shock the moral conscience of the Society; and in such a case, the conclusion that it involves moral turpitude, is inescapable. Accepting this submission, would be ignoring the basic point that arises for consideration in the present Petition, namely; whether the Municipal Commissioner had jurisdiction to examine such a plea. The answer is plainly in the negative. Instead, it will have to be held that it was obligatory on the part of the Municipal Commissioner to make reference to the concerned "Judge" under Section 12(1) of the Act, who alone would be competent to answer that issue.

14. In this view of the matter, the impugned decision of the Municipal Commissioner will have to be set-aside being without jurisdiction, however, at the same time, leaving the question of making reference to the concerned Judge open. In the event, the Municipal Commissioner makes reference to the Judge, as is required by Section 12(1) of the Act, in relation to the issue of whether the

Petitioner has incurred disqualification within the meaning of Section 10(1)(a) of the Act, the concerned Judge shall decide the matter on its own merits in accordance with law, uninfluenced by any of the observations made in the impugned decision or for that matter, the present Judgment. The Commissioner may take appropriate decision in this behalf as expeditiously as possible, if so advised.

15. Petition accordingly succeeds. Rule made absolute.

16. In view of the order passed in the Writ Petition, no further orders are necessary in the accompanying Civil Application No.1840 of 2004, as the Applicant has been heard through his Counsel Mr.A.R.Shaikh.

17. Similarly, nothing survives in Application No.1839 of 2004, as the Writ Petition has been finally disposed of.

18. Accordingly, both the Civil Applications are disposed of.

19. Issuance of certified copy is expedited.

A.M.KHANWILKAR, J.